

STATE OF MICHIGAN
COURT OF APPEALS

EVANGELINE HALL,

Plaintiff-Appellee,

v

NEYSA BARTLETT, D.O., MARTHA WALSH,
M.D., MARK WALKER, M.D., MANSION
STREET OBSTETRICS & GYNECOLOGY, P.C.,
and OAKLAWN HOSPITAL,

Defendants,

and

CARON WARNSBY, M.D., and GENERAL
SURGICAL ASSOCIATES-WMB,

Defendants-Appellants.

EVANGELINE HALL,

Plaintiff-Appellee,

v

NEYSA BARTLETT, D.O., MANSION STREET
OBSTETRICS & GYNECOLOGY, P.C.,
MARTHA WALSH, M.D., MARK WALKER,
M.D., CARON WARNSBY, M.D., CARON
WARNSBY M.D., P.C., GENERAL SURGICAL
ASSOCIATES, P.C., and GENERAL SURGICAL
ASSOCIATES-WMB,

Defendants,

and

OAKLAWN HOSPITAL,

UNPUBLISHED

March 29, 2011

No. 288293

Calhoun Circuit Court

LC No. 06-002001-NH

No. 290147

Calhoun Circuit Court

LC No. 06-002001-NH

Defendant-Appellant.

Before: SAWYER, P.J., and FITZGERALD and SAAD, JJ.

PER CURIAM.

In Docket No. 288293, defendants Caron Warnsby, M.D. and General Surgical Associates-WMB (“the Warnsby defendants”) appeal as of right from the trial court’s order denying their motion for case evaluation sanctions following a jury verdict of no cause of action in this medical malpractice action. In Docket No. 290147, defendant Oaklawn Hospital (“Oaklawn”) appeals as of right from a judgment in favor of plaintiff, including the imposition of case evaluation sanctions, following a jury trial. We affirm in both appeals.

I. CASE EVALUATION SANCTIONS (DOCKET NO. 288293)

In Docket No. 288293, the Warnsby defendants argue that the trial court erred by failing to award them case evaluation sanctions pursuant to MCR 2.403. We disagree. We review de novo as a question of law a trial court’s decision whether to award case evaluation sanctions. *Jerico Constr, Inc v Quadrants, Inc*, 257 Mich App 22, 28; 666 NW2d 310 (2003). The interpretation of a court rule also presents a question of law that we review de novo. *ISB Sales Co v Dave’s Cakes*, 258 Mich App 520, 526; 672 NW2d 181 (2003).

MCR 2.403(O)(1) provides:

If a party has rejected an evaluation and the action proceeds to verdict, that party must pay the opposing party’s actual costs unless the verdict is more favorable to the rejecting party than the case evaluation. However, if the opposing party has also rejected the evaluation, a party is entitled to costs only if the verdict is more favorable to that party than the case evaluation.

MCR 2.403(O)(4) specifically addresses cases involving multiple defendants. That provision provides, in relevant part:

(a) *Except as provided in subrule (O)(4)(b), in determining whether the verdict is more favorable to a party than the case evaluation, the court shall consider only the amount of the evaluation and verdict as to the particular pair of parties, rather than the aggregate evaluation or verdict as to all parties. However, costs may not be imposed on a plaintiff who obtains an aggregate verdict more favorable to the plaintiff than the aggregate evaluation.*

(b) If the verdict against more than one defendant is based on their joint and several liability, the plaintiff may not recover costs unless the verdict is more favorable to the plaintiff than the total case evaluation as to those defendants, and a defendant may not recover costs unless the verdict is more favorable to that defendant than the case evaluation as to that defendant. [Emphasis added.]

The Warnsby defendants argue that subrule (O)(4)(b) applies because this case involves multiple defendants and joint and several liability. They contend that the phrase “[e]xcept as provided in subrule (O)(4)(b)” indicates that subrule (O)(4)(a) applies only in cases in which subrule (O)(4)(b) does not apply. Plaintiff, on the other hand, argues that that phrase pertains only to the first sentence of subrule (O)(4)(a) and that the second sentence applies regardless of whether a verdict is based on joint and several liability as discussed in subrule (O)(4)(b). The trial court agreed with plaintiff and determined that the second sentence of subrule (O)(4)(a) controls this case.

The legal principles that govern the interpretation of statutes apply to the interpretation of court rules as well. *ISB Sales Co*, 258 Mich App at 526. If the plain and ordinary meaning of the language is clear, judicial construction is neither necessary nor permitted. *Yudashkin v Holden*, 247 Mich App 642, 649; 637 NW2d 257 (2001). Words are accorded their plain, commonly understood meanings. *Marketos v American Employers Ins Co*, 465 Mich 407, 413; 633 NW2d 371 (2001).

Random House Webster’s College Dictionary (2001) defines “however,” as “nevertheless,” “yet,” “on the other hand,” and “in spite of that.” Thus, the second sentence of subrule (O)(4)(a) creates an exception to the rule set forth in the first sentence of the subrule. The first sentence states that, “[e]xcept as provided in subrule (O)(4)(b),” when determining whether a verdict is more favorable to a party than the case evaluation, only the evaluations and verdicts between each pair of parties are considered. The second sentence, beginning with “[h]owever,” provides an exception to that rule and indicates that notwithstanding that rule, costs may not be assessed against a plaintiff who obtains an aggregate verdict more favorable than the aggregate case evaluation. The exception applies to the entire rule set forth in the first sentence, including the first phrase. Nothing in subrule (O)(4)(a) indicates that the second sentence applies only to that portion of the first sentence that follows the introductory phrase. In other words, the remainder of subrule (O)(4)(a) is not inapplicable if subrule (O)(4)(b) applies.¹

Our analysis based on the plain language of the court rule is consistent with the 1995 report of the Supreme Court mediation rule committee, 451 Mich 1205. The Supreme Court appointed the committee for the purpose of analyzing MCR 2.403 and making recommendations regarding proposed amendments to the rule. *Id.* With respect to subrule (O)(4)(a), the committee explained:

The controversy involves the last sentence. To illustrate, assume that the mediation panel awards \$100,000 to Plaintiff against Defendant A and \$50,000

¹ The Warnsby defendants rely on *Williams v Chelsea Community Hosp*, unpublished opinion per curiam of the Court of Appeals, issued December 28, 2006 (Docket No. 261946), in support of their interpretation of the court rule. Because that case is unpublished, it is not precedentially binding under the rule of stare decisis. MCR 7.215(C). Regardless, their reliance is misplaced because *Williams* involved case evaluation sanctions awarded to the plaintiff rather than to the defendants. Thus, the second sentence of subrule (O)(4)(a), regarding costs imposed on a plaintiff, was inapplicable. *Id.* at 8-10.

against Defendant B. Plaintiff rejects. If at trial Plaintiff recovers a verdict of \$200,000 against Defendant A and nothing against Defendant B, Defendant B has certainly obtained a verdict more favorable to it than the mediation award. However, because of the last sentence of subrule (O)(4)(a), Defendant B may not recover costs from Plaintiff.

The scenario described in the above example is identical to this case. It is undisputed that plaintiff received a \$175,000 case evaluation award against the Warnsby defendants, which she rejected. Plaintiff was also awarded a total of \$575,000 against Dr. Martha Walsh, Dr. Neysa Bartlett, and Oaklawn, which she rejected. At trial, the Warnsby defendants received a verdict of no cause of action, but Dr. Bartlett and Oaklawn were determined to be liable in the amount of \$3,365,000. Pursuant to the above example provided by the committee, the Warnsby defendants may not collect case evaluation sanctions from plaintiff because plaintiff obtained an aggregate verdict more favorable than the aggregate case evaluation, as stated in subrule (O)(4)(a). Although the Warnsby defendants argue that the example provided by the committee does not necessarily support plaintiff's position because it does not state whether the defendants are jointly and severally liable, that factor is irrelevant because the second sentence of subrule (O)(4)(a) applies regardless of whether the defendants are jointly and severally liable, i.e., regardless of whether subrule (O)(4)(b) applies, as previously discussed. Accordingly, the trial court properly denied the Warnsby defendants' motion for case evaluation sanctions.

II. TAXABLE COSTS

The Warnsby defendants next argue that the trial court abused its discretion by refusing to award them taxable costs as prevailing parties. We again disagree. "This Court reviews for an abuse of discretion a trial court's decision on a motion for costs under MCR 2.625." *Mason v City of Menominee*, 282 Mich App 525, 530; 766 NW2d 888 (2009). A trial court abuses its discretion when its decision is outside the range of reasonable and principled outcomes. *Id.* But the determination whether a party is a "prevailing party" under MCR 2.625 is a question of law that we review de novo. *Klinke v Mitsubishi Motors Corp*, 219 Mich App 500, 521; 556 NW2d 528 (1996), *aff'd* 458 Mich 582 (1998).

Generally, a "prevailing party" may tax costs pursuant to MCR 2.625(A)(1). *Mason*, 282 Mich App at 530. That provision states:

Costs will be allowed to the prevailing party in an action, unless prohibited by statute or by these rules or unless the court directs otherwise, for reasons stated in writing and filed in the action.

The issue presented here involves the definition of "prevailing party." MCR 2.625(B), entitled "Rules for Determining Prevailing Party," states, in relevant part:

(3) *Actions With Several Defendants.* If there are several defendants in one action, and judgment for or dismissal of one or more of them is entered, those defendants are deemed prevailing parties, even though the plaintiff ultimately prevails over the remaining defendants.

Relying on this language, the Warnsby defendants argue that they are prevailing parties entitled to costs.

Conversely, plaintiff argues that MCR 2.625(A)(1) and MCR 2.403(O)(6), when read together, require that the Warnsby defendants be denied taxable costs. MCR 2.403(O)(6) provides, in relevant part:

For the purpose of determining taxable costs under this subrule and under MCR 2.625, the party entitled to recover actual costs under this rule shall be considered the prevailing party.

According to plaintiff, because she was awarded case evaluation sanctions pursuant to MCR 2.403, the Warnsby defendants cannot be considered prevailing parties under MCR 2.625.

The Warnsby defendants argue that there is no need to look to MCR 2.403(O) to determine whether a party is a “prevailing party” because that term is defined in MCR 2.625. This Court has previously held to the contrary. In *Forest City Enterprises, Inc v Leemon Oil Co*, 228 Mich App 57, 81; 577 NW2d 150 (1998), this Court determined that, when read together, MCR 2.625(B)(2) and MCR 2.403(O)(6) indicate that “the party entitled to actual costs under the mediation rule for a cause of action shall also be deemed the prevailing party under MCR 2.625(B)(2) on the entire record.” See also *Ivezaj v Auto Club Ins Ass’n*, 275 Mich App 349, 367-368; 737 NW2d 807 (2007); *Brown v Gainey Transp Servs, Inc*, 256 Mich App 380, 385; 663 NW2d 519 (2003). That holding is consistent with the principle that if two court rules can be interpreted harmoniously so that they do not conflict, that interpretation controls. *Costa v Community Emergency Med Servs, Inc*, 263 Mich App 572, 584; 689 NW2d 712 (2004), *aff’d* 475 Mich 403 (2006). Moreover, this interpretation does not render nugatory the definition of “prevailing party” in MCR 2.625(B)(3), because MCR 2.403(O)(6) is inapplicable in cases in which no party is entitled to case evaluation sanctions.

The Warnsby defendants rely on *Klinke*, 219 Mich App 500, in support of their argument that MCR 2.403 and MCR 2.625 provide two separate and distinct means of determining whether a party is a prevailing party. *Klinke* fails to support their position because the plaintiff in that case accepted the case evaluation, thus precluding the defendant from recovering case evaluation sanctions. *Klinke*, 219 Mich App at 518. Because no party in that case was entitled to recover case evaluation sanctions, MCR 2.403(O)(6) was inapplicable. In this case, because plaintiff recovered case evaluation sanctions, she was the prevailing party under both MCR 2.403(O)(6) and MCR 2.625, as stated in MCR 2.403(O)(6). Accordingly, the trial court properly denied the Warnsby defendants’ motion to tax costs.

III. BUT FOR CAUSATION

In Docket No. 290147, Oaklawn argues that the trial court erred by denying its motions for a directed verdict and judgment notwithstanding the verdict (“JNOV”) because plaintiff failed to present evidence that, but for the conduct of the nursing staff, she would have been diagnosed and received surgery sooner. We review de novo a trial court’s ruling on a motion for a directed verdict or JNOV. *Snieski v Blue Cross & Blue Shield of Mich*, 469 Mich 124, 131; 666 NW2d 186 (2003). We review the evidence and all inferences in the light most favorable to

the nonmoving party to determine whether the evidence fails to establish a claim as a matter of law. *Id.*

To establish a medical malpractice claim, “a plaintiff must establish four elements: (1) the appropriate standard of care governing the defendant’s conduct at the time of the purported negligence, (2) that the defendant breached that standard of care, (3) that the plaintiff was injured, and (4) that the plaintiff’s injuries were the proximate result of the defendant’s breach of the applicable standard of care.” *Craig v Oakwood Hosp*, 471 Mich 67, 86; 684 NW2d 296 (2004). Regarding the fourth prong, MCL 600.2912a(2) states that “the plaintiff has the burden of proving that he or she suffered an injury that more probably than not was proximately caused by the negligence of the defendant or defendants.”

As our Supreme Court recognized in *Craig*, 471 Mich at 86, “[p]roximate cause’ is a legal term of art that incorporates both cause in fact and legal (or ‘proximate’) cause.”

The cause in fact element generally requires showing that “but for” the defendant’s actions, the plaintiff’s injury would not have occurred. On the other hand, legal cause or “proximate cause” normally involves examining the foreseeability of consequences, and whether a defendant should be held legally responsible for such consequences. [*Skinner v Square D Co*, 445 Mich 153, 163; 516 NW2d 475 (1994) (citations omitted).]

“As a matter of logic, a court must find that the defendant’s negligence was a cause in fact of the plaintiff’s injuries before it can hold that the defendant’s negligence was the proximate or legal cause of those injuries.” *Craig*, 471 Mich at 87. When causation is based on circumstantial evidence, “the plaintiff must present substantial evidence from which a jury may conclude that more likely than not, but for the defendant’s conduct, the plaintiff’s injuries would not have occurred.” *Skinner*, 445 Mich at 164-165.

Oaklawn argues that plaintiff failed to present evidence establishing that but for the actions or inactions of the nursing staff, plaintiff would have been diagnosed and undergone surgery sooner. We disagree. One of plaintiff’s nursing experts, Patricia Waldron, R.N., testified regarding the chain of command, a process that a nurse may implement when she questions a doctor’s treatment of a patient. The chain of command begins with the nurse collaborating with the doctor regarding the patient’s course of treatment. If the nurse disagrees with the course of treatment after collaboration, the chain of command requires the nurse to contact the “charge” nurse, or supervisory nurse, to possibly “trump” the doctor’s orders. According to Waldron, implementing the chain of command encompasses transferring a patient to a higher level of care, such as the intensive care unit, or “ICU.” Oaklawn had a chain of command procedure in place during plaintiff’s hospitalization.

Dr. Brendan Carroll testified regarding the proximate cause between the nurses’ actions and inactions and plaintiff’s injuries. He testified as follows:

Q. Now, you have talked a little bit about bowel perforations being life-threatening conditions, and you have described some of the complications that resulted as a result of her bowel perforation.

I would like to focus for a bit here on the care or the lack of care provided by the healthcare providers at Oaklawn Hospital and whether or not, in your opinion, that was what the law calls a proximate cause, a proximate cause of Ms. Hall's injury and damage in this case. Okay?

A. Yes.

Q. Do you have opinions as to what caused Ms. Hall's injury and damage?

A. The beginning cause was a nick in the bowel.

Q. Right.

A. What caused that nick is a matter of speculation, but the nick is what started the process going.

The delay in diagnosis of the nick is what made it a hundred times worse. And so it was a combination between the nick and then the failure to appreciate the nick that made this much worse. And as the timeline proceeded, the longer that it went—

* * *

The delay in diagnosis is what led to all of the complications, because if the nick had been recognized in the first surgery, it would have been fixed with one or two stitches and there would have been no consequences. There would have been no ventilator, no sepsis, no bandemia. The patient probably would have gone home within a week of the surgery with no consequences. If it was not recognized until the next day, more consequences; the next day, more consequences; and after that, more consequences.

Q. Right. Let me just ask it in a general sense first. Is it your opinion in this case that the delay in diagnosing this injury was a cause, a cause of Ms. Hall's injury and damage?

A. Absolutely.

Q. Now, you started to talk a little bit about what happened in the continuum of time after the initial surgery.

Is a bowel perforation, in terms of the injury to the patient, something that progresses on a continuum?

A. Definitely.

Q. Do you believe that's what happened here; in other words, that the effect of the perforation to the bowel continued to progress?

A. It did happen here, yes.

Dr. Carroll further testified that if plaintiff's bowel injury had been diagnosed after the first blood test (on the night of July 21, 2004) revealed the presence of bands, plaintiff would have experienced only a limited amount of leakage because she would not have been administered cathartics and likely would not have required a ventilator or suffered renal failure. Dr. Carroll also opined that if plaintiff's bowel perforation was diagnosed after the second post-operative day, July 22, 2004, her prognosis would have been worse than if she had been diagnosed sooner, but she likely would not have experienced the catastrophic complications of the sepsis that resulted from the leakage.

Accordingly, Dr. Carroll's testimony showed that the extent of plaintiff's injuries was directly related to the delay in properly diagnosing her. Both Waldron and plaintiff's other nursing expert, Grace McCallum, testified that Oaklawn's nursing staff breached the standard of care by failing to implement the chain of command. Oaklawn contends that plaintiff failed to present evidence showing that if the nursing staff had implemented the chain of command, plaintiff would have been transferred to the ICU and diagnosed sooner. Oaklawn in fact maintains that the alleged nursing negligence did not impact plaintiff's care.

In *Martin v Ledingham*, 282 Mich App 158, 159; 774 NW2d 328 (2009), rev'd 488 Mich 987; 791 NW2d 122 (2010), this Court upheld the dismissal of a medical malpractice action because the plaintiff failed to show that the nursing staff's failure to report her worsening condition to physicians had any effect on her treatment. In that case, the defendant presented the affidavits of Drs. Jeffrey Beaudoin and David Rynbrandt averring that they would not have changed the plaintiff's course of treatment if the nurses had informed them of the plaintiff's condition. *Id.* at 159-163. This Court determined that there was no factual support for the plaintiff's claim that she would have received better treatment if the nurses had "gone up the chain of command[.]" This Court reasoned that Dr. Beaudoin was the chair of the general surgery department and had authority over Dr. Rynbrandt and that Dr. Beaudoin's affidavit indicated that he would not have altered the plaintiff's treatment if he had been summoned sooner, as the plaintiff contended the nurses should have done. *Id.* at 162. Thus, this Court concluded that the evidence did not show that the nurses' alleged negligence was a cause in fact of the plaintiff's injuries. *Id.* at 163.

In lieu of granting leave to appeal, the Supreme Court reversed the judgment of this Court and remanded to the trial court for entry of an order denying the defendant's motion for summary disposition. The Court stated:

Because the plaintiff's expert witness testified at his deposition that, if the nurses had timely informed the treating physician of the plaintiff's deteriorating condition, the standard of care would have required the treating physician to treat the plaintiff differently than he did, while the treating physician averred in his affidavit that he would not have treated the plaintiff any differently than he did even if the nurses had timely informed him of the plaintiff's deteriorating condition, a question of material fact exists that must be resolved by a jury. That is, having presented expert testimony regarding the treatment that the plaintiff, pursuant to the standard of care, should have received in the first 72 hours post-surgery, the treating physician's averment that he would have acted in a manner contrary to this standard of care presents a question of fact and an issue of credibility for the jury to resolve. [*Martin*, 488 Mich at 987-988.]

In *Ykimoff v W A Foote Mem Hosp*, 285 Mich App 80; 776 NW2d 114 (2009), this Court addressed a similar situation. In that case, the defendant hospital argued that the plaintiff did not establish proximate cause because Dr. David Eggert indicated that he would not have intervened sooner if the nursing staff had contacted him regarding the plaintiff's changed condition. *Id.* at 88. The *Ykimoff* Court determined that *Martin* was factually distinguishable. *Id.* at 91, 99. This Court reasoned that the treating physician in *Martin* was apprised of the plaintiff's condition on an ongoing basis but elected not to alter the course of treatment despite the information. Thus, *Martin* involved the physician's conduct based on the actual scenario presented and did not involve speculation or hindsight. This Court stated that, in contrast, Dr. Eggert's assertion that he would not have altered the course of treatment if he had been informed of the plaintiff's changed condition "was speculative at best and self-serving at worst." *Id.* at 91. This Court reasoned that discrepancies in Dr. Eggert's testimony and the immediacy of his initiation of surgery after arriving at the hospital rendered suspect his claim that he would not have intervened sooner if he had been adequately informed. *Id.* at 91-93. Further, this Court recognized that proximate cause determinations are highly fact-dependent and stated that *Martin* and similar cases should be construed very narrowly. *Id.* at 99.

Oaklawn acknowledges that only Dr. Mark Walker was questioned at trial regarding the impact of the nurses' alleged negligence on his course of treatment. Shortly after 5:30 p.m. on the day after plaintiff's hysterectomy, July 21, 2004, Dr. Walker directed Nurse Irene Richter to obtain a complete blood count, or "CBC" on plaintiff. Although the lab results were available at approximately 10:00 p.m., the nurse on duty at that time did not contact Dr. Walker with the results. Rather, Dr. Bartlett reviewed the results of the test the following morning. The results indicated that plaintiff's band level was abnormal at 40 percent. When asked about his course of treatment during trial, Dr. Walker testified:

Q. Hypothetically, if the nurse had contacted you around 10:00 p.m. with the results of the C.B.C., would the results have been of any significance to you in your following of her while you were on-call Wednesday night?

A. I wouldn't have done anything different at that point.

Q. Why not?

A. Because based on what has transpired, based on the results here, there is nothing that tells me that we are dealing with a significant problem.

* * *

Q. And even if you had been called back with the results of that blood test that evening, your testimony to this jury is, you would not have been concerned about an infection; right?

A. Not at that time. In the clinical context of the patient, there was nothing to indicate otherwise.

Oaklawn contends that Dr. Walker's testimony shows that the nurse's failure to contact him with the test results on the night of July 21 did not delay plaintiff's diagnosis or surgery.

Like the testimony in *Ykimoff*, however, Dr. Walker's testimony was speculative and hypothetical. Moreover, because he was a defendant in this case, his testimony may be viewed as self-serving. Oaklawn argues that the jury must have believed Dr. Walker's testimony because it determined that he was not negligent. The jury was free to believe or disbelieve all or portions of Dr. Walker's testimony. See *People v Perry*, 460 Mich 55, 63; 594 NW2d 477 (1999). The jury's determination that Dr. Walker was not professionally negligent does not necessarily mean that it credited his testimony that his course of treatment would not have changed in the hypothetical scenario that he was timely informed of the test results. Moreover, even if the jury credited Dr. Walker's testimony, it could have believed that the nurses' conduct had not resulted in a delay in plaintiff's diagnosis or treatment *at that time*.

We conclude that plaintiff presented substantial evidence from which the jury could conclude, more likely than not, that the nurses' failure to implement the chain of command to transfer plaintiff to the ICU resulted in the delayed diagnosis of and surgery for plaintiff's perforated bowel. As previously discussed, Dr. Carroll testified that the delay in diagnosis was directly related to the extent of plaintiff's injuries. Plaintiff's condition continually worsened until she was finally properly diagnosed after being transferred to the ICU on July 23, 2004, three days after her hysterectomy. Both Waldron and McCallum testified that the standard of care required the nurses to implement the chain of command to transfer plaintiff to a higher level of care. Waldron asserted that it was abnormal for the nurses to call physicians upwards of 14 times regarding plaintiff's worsening condition on July 22 and 23. Dr. Carroll opined that an overwhelming infection could be the only cause of bandemia as high as 40 percent, even on the day after plaintiff's hysterectomy.

On the morning of July 23, a charge nurse became involved in plaintiff's care and was instrumental in effectuating plaintiff's transfer to the ICU. Once in the ICU, it was immediately suspected that plaintiff had sustained a bowel perforation. During his initial assessment of plaintiff, Dr. Gil-Acosta suspected that "there was something major going on in her abdomen, like a perforation, which happened to be the case[.]" He also recognized that plaintiff's extreme bandemia indicated overwhelming infection. Although he testified that he would not have been concerned about a 40 percent bandemia level on the first day after plaintiff's hysterectomy because of the stress of the surgery, he maintained that the 60 percent bandemia level concerned him because it was so high. Plaintiff's 60 percent bandemia level was not discovered until approximately 5:30 a.m. on July 23. Plaintiff underwent surgery at approximately 3:00 p.m. that day and it was then discovered that she had suffered a bowel perforation.

Therefore, based on the unique facts of this case, a reasonable jury could conclude that, more likely than not, if plaintiff had been transferred to the ICU sooner, her bowel perforation would have been discovered and treated sooner. The facts of this case show that once the charge nurse became involved, plaintiff was transferred to the ICU and properly diagnosed. Thus, the jury's determination that the nurses' failure to follow the standard of care proximately caused plaintiff's injuries was not based on mere speculation, but rather on events that actually occurred. Plaintiff's circumstantial evidence facilitated a reasonable inference of causation based on established facts as discussed in *Skinner*, 445 Mich at 164. To the extent that it may be argued that plaintiff's transfer to the ICU was a result of the severity of her condition at the time of her transfer and that she would not have been transferred sooner if the nurses had implemented the chain of command, this question is a factual determination for the jury to make. The jury

obviously believed that the nurses' conduct and failure to adhere to the standard of care resulted in plaintiff's delayed diagnosis and treatment. Plaintiff presented substantial evidence to support that determination.

IV. NURSE MCCALLUM'S PROXIMATE CAUSE TESTIMONY

Oaklawn next argues that the trial court erred by admitting nurse McCallum's expert testimony regarding proximate cause. "[T]his Court reviews a trial court's rulings concerning the qualifications of proposed expert witnesses to testify for an abuse of discretion." *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006). "An abuse of discretion occurs when the decision results in an outcome falling outside the principled range of outcomes." *Id.*

In a medical malpractice action, a plaintiff must establish proximate causation between the breach of the standard of care and the plaintiff's injuries. *Craig*, 471 Mich at 86, 90. Expert testimony is essential to establish this causal link. *Pennington v Longabaugh*, 271 Mich App 101, 104; 719 NW2d 616 (2006).

Oaklawn argues that the trial court erred by allowing McCallum to offer proximate cause testimony because she is a registered nurse who does not engage in the practice of medicine and, therefore, does not have the training, experience, skill, knowledge, or education to offer such testimony under MRE 702.² Oaklawn relies on *Cox v Flint Bd of Hosp Managers*, 467 Mich 1, 19; 651 NW2d 356 (2002), in which our Supreme Court held that "[n]urses do not engage in the practice of medicine." The Court relied in part on former MCL 333.17001(1)(d), which defined "[p]ractice of medicine" as

the diagnosis, treatment, prevention, cure, or relieving of a human disease, ailment, defect, complaint, or other physical or mental condition, by attendance, advice, device, diagnostic test, or other means, or offering, undertaking, attempting to do, or holding oneself out as able to do, any of these acts.^[3] [*Id.* at 19-20.]

Because McCallum's challenged testimony did not involve the practice of medicine, the trial court did not abuse its discretion by admitting it. McCallum testified as follows:

² MRE 702 provides:

If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

³ The identical definition is now provided in MCL 333.17001(1)(f).

Q. Based on your review of the materials in this case, Nurse McCallum, was there any effort to communicate the bandemia or the elevated bands on that blood test on the evening of July 21 to the doctor who ordered them, that would be Dr. Walker?

A. No, there was no effort.

Q. And what did the standard of care require that nurse on duty to do, I believe it was Nurse Dunithan, when the blood test results came back showing the elevated bands? What did the standard of care require?

A. The standard of care required that the nurse call the physician that ordered the test and report the results, especially if there are abnormal values in the lab results.

Q. And would that be nursing negligence, in your opinion?

A. Yes.

Q. We are going to follow this particular issue through in terms of what happened with the issue of the bands and so forth as the patient progressed or didn't progress in her post-operative course.

* * *

Q. Did the failure to report the bands cause some problem with this patient's outcome?

A. Yes.

Q. And what effect did it have on her outcome, the failure to report the bands that evening?

A. The conduct of the nurse that failed to report the lab results to the doctor was in violation of the standard of conduct that is expected of nurses. And what that means is, the failure to report pertinent information such as this and other things, and failure to collaborate, can result in a significant delay in treatment.

Q. Is that what happened here?

A. Yes.

Thus, McCallum testified that the nurse's failure to adhere to the standard of care resulted in a significant *delay* in treatment. McCallum did not testify regarding plaintiff's ultimate diagnosis or treatment, matters specifically reserved for the practice of medicine. Oaklawn argues that in order for McCallum to testify that the nurse's actions affected the timing of plaintiff's diagnosis, she necessarily had to have the knowledge, skill, and training to make the diagnosis. We disagree. It is undisputed that plaintiff suffered from a perforated bowel, a condition that progressively becomes worse the longer that it remains undiagnosed. Thus, it was not necessary

that McCallum have the knowledge and training to diagnose the condition in order to testify that the nurse's actions led to a delay in diagnosis and treatment.

Oaklawn also relies on *Snelson v Kamm*, 319 Ill App 3d 116; 745 NE2d 128 (2001), aff'd in part & rev'd in part 204 Ill 2d 1 (2003), in support of its argument that McCallum was not qualified to offer proximate cause testimony between the nursing staff's breach of the standard of care and the delay in diagnosis and surgery. In that case, McCallum testified that "the failure to follow the nursing process increases the likelihood of an unfavorable outcome." *Id.* at 126. McCallum declined to offer an opinion regarding what ultimately caused the plaintiff's injury, stating that she "would leave that for 'medicine to decide.'" *Id.* Thus, McCallum acknowledged that she did not possess the medical knowledge to form an opinion regarding proximate cause in that case. *Id.* at 130. Here, it is undisputed that the bowel perforation ultimately caused plaintiff's injury. McCallum's testimony pertained to the delay in diagnosing and treating the injury as a result of the negligence of Oaklawn's nursing staff rather than the ultimate cause of the injury itself. Because this matter was within McCallum's expertise, the trial court did not abuse its discretion by admitting the testimony. In any event, as previously discussed, plaintiff presented other expert witness testimony establishing proximate cause between the nursing negligence and her injuries.

V. TRADITIONAL MALPRACTICE VS. LOST OPPORTUNITY

Oaklawn next argues that the trial court erred by denying its motions for a directed verdict and JNOV because plaintiff failed to present evidence that she suffered a greater than 50 percent opportunity for a better result. Thus, Oaklawn asserts that plaintiff alleged a loss of opportunity claim rather than a traditional medical malpractice claim.

MCL 600.2912a(2) provides:

In an action alleging medical malpractice, the plaintiff has the burden of proving that he or she suffered an injury that more probably than not was proximately caused by the negligence of the defendant or defendants. In an action alleging medical malpractice, the plaintiff cannot recover for loss of an opportunity to survive or an opportunity to achieve a better result unless the opportunity was greater than 50%.

In *Fulton v William Beaumont Hosp*, 253 Mich App 70, 84; 655 NW2d 569 (2002), overruled by *O'Neal v St. John Hosp & Med Ctr*, 487 Mich 485; 791 NW2d 853 (2010), this Court held that, in order to satisfy the second sentence of § 2912a(2), a plaintiff must show that the defendant's malpractice resulted in a loss of opportunity greater than 50 percent. The plaintiff in *Fulton* alleged that the defendants' failure to properly diagnose and treat her resulted in a loss of opportunity to survive. *Fulton*, 253 Mich App at 73.

In *Stone v Williamson*, 482 Mich 144, 147; 753 NW2d 106 (2008), our Supreme Court addressed the *Fulton* Court's interpretation of § 2912a(2). In the lead opinion, Chief Justice Taylor opined that the two sentences in § 2912a(2) create a paradox by allowing claims under the second sentence that are precluded by the first. *Id.* at 157 (TAYLOR, C.J.) He determined that the second sentence is incomprehensible and unenforceable and that this Court's interpretation of the sentence in *Fulton* is no longer good law. *Id.* at 161-162. However, Chief Justice Taylor

determined that a new trial was unnecessary because, regardless of the jury's finding with respect to lost opportunity, the jury determined that the traditional elements of medical malpractice, set forth in the first sentence of § 2912a(2), had been met. *Id.* at 162-163. Justices Corrigan and Young concurred with Chief Justice Taylor. *Id.* at 165. Although Justices Cavanagh, Weaver, and Kelly agreed that *Stone* involved a traditional medical malpractice claim, they did not agree that the second sentence of § 2912a(2) is incomprehensible and unenforceable. *Id.* at 165, 185 (CAVANAGH, J.). Likewise, Justice Markman determined that the "lost opportunity" provision of § 2912a(2) is enforceable, but he opined that the case presented a lost opportunity claim rather than a traditional medical malpractice claim. *Id.* at 185-187. (MARKMAN, J.).

Recently in *O'Neal*, our Supreme Court revisited this Court's decision in *Fulton* and issued another plurality opinion. In *O'Neal*, the plaintiff suffered from acute chest syndrome ("ACS"), a complication of sickle cell anemia. The plaintiff alleged that he suffered a stroke as a result of the defendants' failure to timely perform a blood transfusion or exchange transfusion. His complaint alleged a traditional medical malpractice claim rather than a lost opportunity claim. *O'Neal*, 487 Mich at 491 (HATHAWAY, J.). Notwithstanding, the defendants moved for summary disposition, arguing that both sentences of § 2912a(2) controlled and that the plaintiff failed to establish a loss of opportunity greater than 50 percent. The plaintiff argued that his experts' testimony showed that he suffered injuries that were, more probably than not, proximately caused by the defendants' negligence. *Id.* at 492. The trial court agreed and denied the defendants' motion. *Id.* On appeal, this Court relied on *Fulton* and held that the plaintiff had alleged a lost opportunity claim and that he failed to establish his burden of proof. *Id.*

Our Supreme Court granted leave to appeal in *O'Neal*, directing the parties to address, inter alia, "whether the requirements set forth in the second sentence of MCL 600.2912a(2) apply in this case[.]" *O'Neal*, 487 Mich at 493. Writing the lead opinion, Justice Hathaway, joined by Justice Weaver, recognized that the first sentence of § 2912a(2) states the well-established rule for proving proximate causation in medical malpractice claims. *Id.* at 494, 507. She further stated:

Thus, the burden of proof for proximate causation in traditional medical malpractice cases is analyzed according to its historical common law definitions and the analysis is the same as in any other ordinary negligence claim. Nothing in this opinion changes or alters these well-settled principles. [*Id.* at 497.]

Justice Hathaway next considered whether this Court erred by relying on *Fulton* and applying the second sentence of § 2912a(2) to the plaintiff's claims. *Id.* at 497. She opined that the second sentence of § 2912a(2) clearly applies to loss of opportunity cases based on its plain language and that it does not apply to traditional malpractice cases. Justice Hathaway then stated that because this Court relied on *Fulton*, "*which erroneously applied the second sentence to a traditional malpractice case,*" it was necessary to determine if *Fulton* has any continuing validity. *Id.* at 498 (emphasis added). Justice Hathaway proceeded to analyze the test that this Court applied in *Fulton* and concluded that "*Fulton's* simple subtraction analysis is wrong and unsupportable." *Id.* at 504. She further opined that the incorrect *Fulton* mathematical formula "is being used to transform the burden of proof in traditional malpractice cases." Finally, Justice Hathaway concluded that "the second sentence of § 2912a(2) applies only to medical malpractice cases that plead loss of opportunity and not to those that plead traditional medical malpractice;

we do not address the scope, extent, or nature of loss-of-opportunity claims as that issue is not before us.”⁴ *Id.* at 506.

In determining that *O’Neal* involved a traditional medical malpractice claim rather than a lost opportunity claim, Justice Hathaway offered little analysis. She recognized that the plaintiff suffered a stroke and that his claim was thus for an actual injury rather than the mere possibility of an injury. *O’Neal*, 487 Mich at 503. She further stated:

Plaintiff’s injury is no longer a statistical probability, it is a reality. The focus, once he was injured, is on the connection between defendants’ conduct and the injury. The relevant inquiry for proximate causation is whether the negligent conduct was a cause of plaintiff’s injury and whether plaintiff’s injury was a natural and probable result of the negligent conduct. [*Id.*]

Justice Cavanagh, joined by Chief Justice Kelly, concurred in the result. He opined that this Court erred by treating the case as a lost opportunity case rather than a traditional medical malpractice action and thus determined that the second sentence of § 2912a(2) was inapplicable. *O’Neal*, 487 Mich at 507 (CAVANAGH, J.) He further stated that *Fulton* should be overruled “to the extent that courts have relied on it to improperly transform what could be traditional medical malpractice claims into loss-of-opportunity claims.” *Id.* Regarding the first sentence of § 2912a(2), Justice Cavanagh stated, “I would hold that this threshold is met if the plaintiff can show that the alleged negligence was responsible for a majority, or ‘more than fifty percent,’ of the risk of the bad result occurring.” *Id.* at 509.

Finally, Justices Markman and Young, joined by Justice Corrigan, concluded that *O’Neal* presented a lost opportunity claim rather than a traditional medical malpractice claim. *O’Neal*, 487 Mich at 515 (MARKMAN, J.); *Id.* at 549 (YOUNG, J.). Thus, although a majority of Justices believed that *O’Neal* involved a traditional medical malpractice case, the reasons for their determination were not discussed at any length and *O’Neal* did not set forth a new test for determining whether a claim presents a traditional malpractice or a lost opportunity claim.

As previously recognized, six Justices in *Stone* agreed that that case involved a claim alleging traditional medical malpractice rather than lost opportunity. *Stone*, 482 Mich at 162-163 (TAYLOR, C.J.), 165 (CAVANAGH, J.) As Chief Justice Taylor recognized, “‘This theory [i.e., loss of opportunity] is potentially available in situations where a plaintiff cannot prove that a

⁴ Justice Hathaway offered no reasoning for her determination that *Fulton* involved a traditional medical malpractice claim rather than a lost opportunity claim. In *Fulton*, 253 Mich App at 73, the plaintiff alleged in her complaint that the defendants’ failure to properly diagnose and treat her resulted in a loss of opportunity to survive. This Court clearly regarded the plaintiff’s claim as one asserting loss of opportunity and therefore examined the second sentence of § 2912a(2) in deciding that case. *Id.* at 77-84. Because Justice Hathaway opined that *O’Neal* involved a traditional medical malpractice claim rather than a lost opportunity claim, her examination of this Court’s analysis in *Fulton*, which was based on the second sentence of § 2912a(2), is arguably dicta.

defendant's actions were the cause of his injuries, but can prove that the defendant's actions deprived him of a chance to avoid those injuries.'” *Stone*, 482 Mich at 152 (TAYLOR, C.J.), quoting *Vitale v Reddy*, 150 Mich App 492, 502; 389 NW2d 456 (1986), vacated 430 Mich 894 (1988). In *Stone*, the plaintiff suffered an abdominal aortic aneurysm that was undetected despite examinations and testing. *Id.* at 147. He underwent emergency surgery to repair the rupture, but he suffered complications and ultimately required amputation of both of his legs at mid-thigh. *Id.* at 148.

In *Taylor v Kent Radiology, PC*, 286 Mich App 490, 494; 780 NW2d 900 (2009), the injured plaintiff fell and fractured his foot. Following x-rays, he was informed that his foot was not broken but was merely sprained. *Id.* at 495-496. Several months later, following another x-ray, he was advised that his foot was broken. *Id.* at 496. In his complaint, the plaintiff alleged that the first radiologist violated the standard of care by failing to properly review and interpret his x-rays, which caused his fracture to remain undiagnosed and untreated, requiring extensive surgical intervention. *Id.* at 507-508. This Court stated that it was evident from the plaintiff's complaint that he alleged a traditional malpractice action and that the complaint contained no reference to a loss of opportunity to achieve a better result. This Court recognized that the plaintiff alleged that the radiologist breached the standard of care, which proximately caused a worsening of his fracture. *Id.* at 508.

In *Shivers v Schmiede*, 285 Mich App 636, 638; 776 NW2d 669 (2009), the 70-year-old plaintiff was admitted to the hospital to have his bladder removed. Complications occurred during the surgery, and a nurse reported weakness in both of his hands following the surgery. Later that evening, a nurse noted that the plaintiff's left arm and hand were normal but that his right arm was abducting, or involuntary moving up and away from his torso. His condition did not improve throughout the night, and he lost sensation in both of his hands by midnight. By 3:47 a.m., he had lost feeling in both arms and was unable to move his fingers. *Id.* Later that morning, doctors discovered that the plaintiff could not move his left arm and that his right arm evidenced significant neurological difficulties. Doctors performed an emergency decompressive cervical laminectomy, but by that time the plaintiff had already lost most of the use of his hands and arms. Thereafter, he required a significant level of care. *Id.* at 639. This Court determined that the case involved a traditional medical malpractice claim rather than a loss of opportunity claim. *Id.* at 640.

This case is very similar to *Shivers* in that plaintiff underwent surgery and thereafter experienced complications that required a second surgery. In *Shivers*, 285 Mich App at 641, this Court opined from the evidence that an earlier surgical procedure would have helped the plaintiff's condition. Likewise, in this case, if plaintiff had undergone surgery to correct the bowel perforation sooner, the effects of the perforation would not have been as injurious and she would not have suffered as severely. This is not a situation where, as Chief Justice Taylor stated in *Stone*, 482 Mich at 152, the plaintiff was unable to prove that the defendant's actions caused her injuries but was able to prove that they deprived her of a chance to avoid her injuries. As previously discussed, plaintiff presented sufficient evidence for the jury to determine that, but for the nurses' conduct, she more likely than not would have been diagnosed and undergone surgery sooner. Moreover, plaintiff did not allege in her complaint the loss of an opportunity to obtain a better result. In any event, Oaklawn admits that plaintiff withdrew the loss of opportunity theory during trial and that the jury was not instructed on that theory. Accordingly, this case involves a

traditional medical malpractice claim rather than a loss of opportunity claim. The trial court did not err by denying Oaklawn's motion for a directed verdict or JNOV on this basis.

VI. SPOILIATION OF EVIDENCE

Oaklawn next argues that the trial court erred by admitting evidence regarding the alteration and spoliation of a medical record and by instructing the jury in this regard. Specifically, Oaklawn challenges the admission of McCallum's testimony regarding a discrepancy on one page of plaintiff's hospital record. Because Oaklawn did not object to the testimony regarding the discrepancy, this issue is not preserved for our review. We review unpreserved issues for plain error affecting substantial rights. To avoid forfeiture, a party must show that an error occurred, that it was plain, i.e., clear or obvious, and that it affected substantial rights. *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000).

The admission of McCallum's testimony regarding the discrepancy between the medical records did not constitute plain error. McCallum merely testified that there was indeed a discrepancy between the two records and that it was "a big change." The two records were admitted as evidence and the jury was able to observe the discrepancy between the records firsthand. Moreover, the testimony reflected only 1-1/2 transcript pages of trial testimony in a trial that lasted more than 14 days. As the trial court observed, "This is a mountain out of a mole hill, I know. There are two numbers on two pieces of paper out of the thousands of sheets out of all the testimony of the experts[.]" Thus, Oaklawn has not established a plain error regarding the admission of McCallum's testimony. Although Oaklawn also contends that the trial court erred by admitting McCallum's testimony regarding a hospital's obligation to preserve a patient's original medical record, the trial court sustained Oaklawn's objection to that question and McCallum did not answer it.

Oaklawn also argues that the trial court erred by instructing the jury in accordance with statutory law pertaining to the destruction of medical records. We review for an abuse of discretion a trial court's determination whether a jury instruction is applicable to the facts of a case. *Bordeaux v Celotex Corp*, 203 Mich App 158, 168-169; 511 NW2d 899 (1993).

The trial court instructed the jury nearly verbatim on the following portions of MCL 333.20175:

(1) A health facility or agency shall keep and maintain a record for each patient, including a full and complete record of tests and examinations performed, observations made, treatments provided, and in the case of a hospital, the purpose of hospitalization. . . . [A] health facility or agency shall keep and retain each record for a minimum of 7 years from the date of service to which the record pertains. A health facility or agency shall maintain the records in such a manner as to protect their integrity, to ensure their confidentiality and proper use[.] . . . A health facility or agency may destroy a record that is less than 7 years old only if both of the following are satisfied:

(a) The health facility or agency sends a written notice to the patient at the last known address of that patient informing the patient that the record is about to be destroyed, offering the patient the opportunity to request a copy of that record, and requesting the patient's written authorization to destroy the record.

(b) The health facility or agency receives written authorization from the patient or his or her authorized representative agreeing to the destruction of the record. Except as otherwise provided under federal or state laws and regulations, records required to be maintained under this subsection may be destroyed or otherwise disposed of after being maintained for 7 years. If records maintained in accordance with this section are subsequently destroyed or otherwise disposed of, those records shall be shredded, incinerated, electronically deleted, or otherwise disposed of in a manner that ensures continued confidentiality of the patient's health care information and any other personal information relating to the patient.

...

(2) A hospital shall take precautions to assure that the records required by subsection (1) are not wrongfully altered or destroyed. . . .

The trial court further instructed the jury regarding the definition of "medical record" and "record" set forth in MCL 333.20175a(5), which provides:

As used in this section:

(a) "Medical record" or "record" means information, oral or recorded in any form or medium, that pertains to a patient's health care, medical history, diagnosis, prognosis, or medical condition and that is maintained by a licensee in the process of providing medical services.

Further, the trial court instructed the jury nearly verbatim regarding MCL 750.492a, which provides:

(1) Except as otherwise provided in subsection (3), a health care provider or other person, knowing that the information is misleading or inaccurate, shall not intentionally, willfully, or recklessly place or direct another to place in a patient's medical record or chart misleading or inaccurate information regarding the diagnosis, treatment, or cause of a patient's condition. A violation of this subsection is punishable as follows:

(a) A health care provider who intentionally or willfully violates this subsection is guilty of a felony.

(b) A health care provider who recklessly violates this subsection is guilty of a misdemeanor, punishable by imprisonment for not more than 1 year, or a fine of not more than \$1,000.00, or both.

(d) A person other than a health care provider who recklessly violates this subsection is guilty of a misdemeanor.

(2) Except as otherwise provided in subsection (3), a health care provider or other person shall not intentionally or willfully alter or destroy or direct another to alter or destroy a patient's medical records or charts for the purpose of concealing his or her responsibility for the patient's injury, sickness, or death. A health care provider who violates this subsection is guilty of a felony. A person other than a health care provider who violates this subsection is guilty of a misdemeanor punishable by imprisonment for not more than 1 year, or a fine of not more than \$1,000.00, or both.

(3) Subsections (1) and (2) do not apply to either of the following:

(a) Destruction of a patient's original medical record or chart if all of the information contained in or on the medical record or chart is otherwise retained by means of mechanical or electronic recording, chemical reproduction, or other equivalent techniques that accurately reproduce all of the information contained in or on the original or by reproduction pursuant to the records media act that accurately reproduces all of the information contained in or on the original.

(b) Supplementation of information or correction of an error in a patient's medical record or chart in a manner that reasonably discloses that the supplementation or correction was performed and that does not conceal or alter prior entries.

(4) This section does not create or provide a basis for a civil cause of action for damages.

(c) A person other than a health care provider who intentionally or willfully violates this subsection is guilty of a misdemeanor, punishable by imprisonment for not more than 1 year, or a fine of not more than \$1,000.00, or both.

The statutes do not favor either plaintiff or Oaklawn. They do not require Oaklawn to maintain original copies of records, but rather allow Oaklawn to store records "in any form or medium." Moreover, no evidence was presented that Oaklawn's personnel willfully and intentionally recorded inaccurate information or destroyed plaintiff's records for the purpose of concealing responsibility for her injuries. Rather, the facts show that plaintiff's original record was destroyed after being preserved in electronic form, which is permitted under MCL 750.492a(3)(a) if the record is accurately reproduced. It appears that the discrepancy between the two records is the likely result of one copy simply being clearer and easier to read than the other. Thus, the jury could have easily determined that the record was accurately reproduced in electronic form. Moreover, as previously discussed, the statutory law is irrelevant to the issues that the jury was asked to determine and indicate on the verdict form. In any event, it is incomprehensible that the discrepancy regarding the single blood pressure entry would have affected the jury's decision in light of the extensive evidence presented during trial. Accordingly, even if the trial court abused its discretion by instructing the jury as such, reversal is not warranted.

VII. REBUTTAL TESTIMONY

Oaklawn next argues that the trial court erred by refusing to admit the rebuttal testimony of forensic document analyst Erich J. Speckin, and by denying its motion for a new trial on this ground. We review a motion for a new trial under the abuse of discretion standard. *Hilgendorf v St John Hosp & Med Ctr Corp*, 245 Mich App 670 682; 630 NW2d 356 (2001). Similarly, we review for an abuse of discretion a trial court's decision whether to admit rebuttal testimony. *Winiemko v Valenti*, 203 Mich App 411, 418; 513 NW2d 181 (1994).

Rebuttal evidence must relate to a substantive rather than a collateral matter. *City of Westland v Okopski*, 208 Mich App 66, 72; 527 NW2d 780 (1994). As previously discussed, the purported testimony pertained to a collateral matter rather than a substantive matter. The trial court appropriately recognized that the discrepancy involved "two numbers on two pieces of paper out of the thousands of sheets" and that the impact on the jury would be "infinitesimal at best." The trial court further indicated that it would not conduct a "trial within a trial" regarding the issue. Because the matter involved a collateral matter and was not particularly relevant to the jury's determination considering the overall evidence presented, the trial court did not abuse its discretion by refusing to admit Speckin's testimony. The trial court also properly denied Oaklawn's motion for a new trial on this basis.

VIII. REDUCTION OF PAST MEDICAL EXPENSES

Oaklawn next contends that the trial court erred by refusing to reduce plaintiff's award of past medical expenses to the amount actually paid on her behalf. We review de novo as a question of law a trial court's interpretation and application of MCL 600.6303, the collateral source rule. *Shivers*, 285 Mich App at 653.

Oaklawn argues that the trial court erred by failing to apply the collateral source rule⁵ to reduce plaintiff's \$450,000 award for past medical expenses to \$325,441.47, the amount of medical expenses actually paid by plaintiff's health insurers. This argument lacks merit.

MCL 600.6303 provides, in relevant part:

(1) In a personal injury action in which the plaintiff seeks to recover for the expense of medical care . . . evidence to establish that the expense or loss was paid or is payable, in whole or in part, by a collateral source shall be admissible to the court in which the action was brought after a verdict for the plaintiff and before a judgment is entered on the verdict. Subject to subsection (5), if the court determines that all or part of the plaintiff's expense or loss has been paid or is payable by a collateral source, the court shall reduce that portion of the judgment which represents damages paid or payable by a collateral source by an amount equal to the sum determined pursuant to subsection (2). This reduction shall not

⁵ Although Oaklawn uses the term "remittitur," it cites MCL 600.6303, the collateral source rule.

exceed the amount of the judgment for economic loss or that portion of the verdict which represents damages paid or payable by a collateral source.

* * *

(3) Within 10 days after a verdict for the plaintiff, plaintiff's attorney shall send notice of the verdict by registered mail to all persons entitled by contract to a lien against the proceeds of plaintiff's recovery. If a contractual lien holder does not exercise the lien holder's right of subrogation within 20 days after receipt of the notice of the verdict, the lien holder shall lose the right of subrogation. . . .

(4) As used in this section, "collateral source" means benefits received or receivable from an insurance policy *Collateral source does not include benefits paid or payable by a person, partnership, association, corporation, or other legal entity entitled by contract to a lien against the proceeds of a recovery by a plaintiff in a civil action for damages, if the contractual lien has been exercised pursuant to subsection (3).* [Emphasis added.]

In *Zdrojewski v Murphy*, 254 Mich App 50, 59; 657 NW2d 721 (2002), the plaintiff was awarded \$256,678 in past economic damages. The plaintiff's health care insurers paid more than \$88,000 of her medical expenses, but claimed liens against the plaintiff's judgment totaling less than \$30,000. *Id.* at 68, 70. Relying on the last sentence of MCL 600.6303(4), emphasized above, this Court opined that the collateral source rule does not encompass a situation in which a lienholder exercises a lien, but for less than the amount that the lienholder is entitled to recover. This Court held that "[b]ecause the statute clearly states that benefits subject to an exercised lien do not qualify as a collateral source," and because the insurers exercised liens, the insurance benefits did not constitute a collateral source under MCL 600.6303(4). *Id.* at 70.

Nothing meaningfully distinguishes this case from *Zdrojewski*. Thus, under MCL 600.6303, as interpreted in *Zdrojewski*, the trial court did not err by declining to reduce the jury's past medical expenses award by \$124,558.53.

Oaklawn also argues that the trial court erred by refusing to exercise its powers of remittitur under MCL 600.6098 and MCR 2.611(E) to reduce the past medical expenses award to the value of expenses paid. Although plaintiff contends that Oaklawn waived appellate review of this argument by failing to file a motion for remittitur in the trial court, we will review this issue because Oaklawn's substantive argument in opposition to plaintiff's motion for entry of judgment in the trial court was sufficient to raise this issue. We review for an abuse of discretion a trial court's decision on a motion for remitter. *Unibar Maintenance Servs, Inc v Saigh*, 283 Mich App 609, 629; 769 NW2d 911 (2009).

“The power of remittitur should be exercised with restraint.” *Shaw v City of Ecorse*, 283 Mich App 1, 17; 770 NW2d 31 (2009). MCR 2.611(E)(1)⁶ governs remittitur, which is justified only if the jury’s verdict is excessive, or greater than the highest amount that the evidence will support. *Heaton v Benton Constr Co*, 286 Mich App 528, 539; 780 NW2d 618 (2009). “If the award falls reasonably within the range of the evidence and within the limits of what reasonable minds would deem just compensation, it should not be disturbed.” *Shaw*, 283 Mich App at 17. This Court reviews the evidence in the light most favorable to the nonmoving party. *Id.*

Here, the evidence supported the jury’s award for past medical expenses in the amount of \$450,000. Plaintiff testified that she incurred costs of approximately \$450,000 for her medical care. James Marsh, with whom plaintiff lived, testified that plaintiff’s medical expenses totaled \$446,463.85. Oaklawn failed to challenge this testimony during trial. Because the jury did not award past medical expenses in an amount greater than the highest amount supported by the evidence, the trial court did not abuse its discretion by denying remittitur.

IX. CASE EVALUATION SANCTIONS (DOCKET NO. 290147)

Oaklawn next argues that the trial court erred by awarding plaintiff case evaluation sanctions. We disagree. Oaklawn asserts that the trial court erred by failing to apply the noneconomic damages cap to the jury’s verdict in determining whether plaintiff is entitled to case evaluation sanctions. The language of MCR 2.403(O)(3) fails to support Oaklawn’s argument. That provision states that, for purposes of determining whether a party is entitled to case evaluation sanctions under MCR 2.403(O)(1), that

a verdict must be adjusted by adding to it assessable costs and interest on the amount of the verdict from the filing of the complaint to the date of the case evaluation, and, if applicable, by making the adjustment of future damages as provided by MCL 600.6306. After this adjustment, the verdict is considered more favorable to a defendant if it is more than 10 percent below the evaluation, and is considered more favorable to the plaintiff if it is more than 10 percent above the evaluation. If the evaluation was zero, a verdict finding that a defendant is not liable to the plaintiff shall be deemed more favorable to the defendant.

⁶ MCR 2.611(E)(1), pertaining to remittitur and additur, provides:

If the court finds that the only error in the trial is the inadequacy or excessiveness of the verdict, it may deny a motion for new trial on condition that within 14 days the nonmoving party consent in writing to the entry of judgment in an amount found by the court to be the lowest (if the verdict was inadequate) or highest (if the verdict was excessive) amount the evidence will support.

MCL 600.6098(2)(d) is substantially similar to MCR 2.611(E)(1).

Nothing in this provision requires that a verdict be adjusted to apply the noneconomic damages cap and Oaklawn fails to identify any authority requiring such an adjustment. In any event, even if the noneconomic damages cap is applied, plaintiff is entitled to case evaluation sanctions as discussed below.

Oaklawn also argues that the trial court erred by failing to reduce plaintiff's past medical expenses to the amount actually paid for purposes of determining plaintiff's entitlement to case evaluation sanctions. As previously discussed, the trial court did not err by refusing to reduce plaintiff's past medical expenses to the amounts paid. Because Oaklawn was not entitled to such an adjustment with respect to the judgment, it was likewise not entitled to the adjustment regarding the verdict for purposes of determining case evaluation sanctions.

Oaklawn's primary argument is that the trial court erred by refusing to consider Oaklawn's percentage of fault in comparison to that of Dr. Bartlett. The jury determined that Oaklawn was 15 percent at fault and that Dr. Bartlett was 85 percent at fault for plaintiff's injuries. Thus, Oaklawn contends that, in determining whether to award case evaluation sanctions, the trial court should have compared the case evaluation against Oaklawn in the amount of \$175,000 to only 15 percent of the verdict. Oaklawn's argument lacks merit. MCR 2.403(O)(4) provides, in relevant part:

(a) Except as provided in subrule (O)(4)(b), in determining whether the verdict is more favorable to a party than the case evaluation, the court shall consider only the amount of the evaluation and verdict as to the particular pair of parties, rather than the aggregate evaluation or verdict as to all parties. However, costs may not be imposed on a plaintiff who obtains an aggregate verdict more favorable to the plaintiff than the aggregate evaluation.

(b) *If the verdict against more than one defendant is based on their joint and several liability, the plaintiff may not recover costs unless the verdict is more favorable to the plaintiff than the total case evaluation as to those defendants, and a defendant may not recover costs unless the verdict is more favorable to that defendant than the case evaluation as to that defendant. [Emphasis added.]*

Here, because plaintiff was without fault, Oaklawn and Dr. Bartlett are jointly and severally liable pursuant to MCL 600.6304(6)(a). Thus, subrule (O)(4)(b) applies in this case. Because the jury's verdict in excess of \$3.6 million is more favorable to plaintiff than the total case evaluation against Oaklawn and Dr. Bartlett in the amount of \$525,000, plaintiff is entitled to sanctions under subrule (O)(4)(b). Even assuming for the sake of argument that the noneconomic damages cap should have been applied to the jury verdict as Oaklawn argues, the verdict would still be more favorable to plaintiff than the total case evaluation against Oakland and Dr. Bartlett. The noneconomic damages cap was applied to the judgment, which exceeds \$1.2 million. That number is more than ten percent higher than Oaklawn and Dr. Bartlett's combined case evaluation of \$525,000. Accordingly, the trial court properly awarded plaintiff case evaluation sanctions against Oaklawn.

Affirmed.

/s/ E. Thomas Fitzgerald

/s/ David H. Sawyer

/s/ Henry William Saad